

Mr Edward Young v Australia, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003)

1) Reference Details

Jurisdiction: UN Human Rights Committee, Seventy-eighth session

Date of Decision: 6 August 2003

Case Status: Concluded by the Human Rights Committee

Link to full case: <http://www1.umn.edu/humanrts/undocs/941-2000.html>

2) Facts

The author was in a same-sex relationship with Mr C for 38 years. Mr C was a war veteran, whom the author cared for in the last years of his life. He died on 20 December 1998, at the age of 73. On 1 March 1999, the author applied for a pension under s. 13 of the Veterans' Entitlement Act 1986 ("VEA") as a veteran's dependant. On 12 March 1999, the Repatriation Commission denied the author's application because he was not a dependant as defined by the Act.

On 16 March 1999, the author applied to the Veterans Review Board ("VRB") for a review of the Commission's decision. On 27 October 1999, the Board affirmed the Commission's decision, finding that the author was not a dependant as defined by the Act. In its decision the Board outlined the legislation as above and considered that it:

"[h]as no discretion in its application of the Act and in this case it is bound to have regard to Section 11 of the Act. Hence, under the current legislation, the Board is required to affirm the decision under review in relation to the status of the applicant".

3) Law

National Law

- Veterans' Entitlement Act 1986
- Marriage Act 1961

International Law

- UN International Covenant on Civil and Political Rights 1966, Article 17 (right to privacy, home, family and correspondence) and Article 26 (right to non-discrimination)

4) Legal Arguments

The Author

The author argued that the State party's refusal to provide him with a pension benefit, on the basis of him being of the same sex as his partner, violates his right to equal treatment before the law, contrary to Article 26. He conceded that Article 26 does not compel a State party to enact particular legislation, but argued that where a state does enact legislation, that legislation must comply with Article 26. The author argued that although he could have appealed to the Commonwealth Administrative Appeals Tribunal ("AAT") such an appeal would have had no prospect of success, as it would also have been bound by the provisions of the VEA.

The State

The State party challenged the admissibility of the author's claim. It argued that the author is not a victim within the meaning of Article 1 of the Optional Protocol. It argued that a thorough examination of the facts and their application to the VEA reveals that no partner of Mr. C, whether homosexual or heterosexual, would have been entitled to the pension under the VEA. Consequently, the State party argues that neither the author's sexual orientation nor the sexual orientation of Mr. C is determinative of the issue.

Similarly, the State party recalling the Committee's jurisprudence argued that the author had not sufficiently substantiated his case for the purposes of admissibility. To raise a prima facie case, the State party argues that the author must establish that he was denied a benefit that would have been available to a heterosexual. The State party submitted that the author was unable to substantiate the claim that his lack of entitlement to the pension under the VEA is determined by a distinction based on sexual orientation in breach of Article 26.

Author's further comments

By submission of 17 August 2001, the author reiterated that he was a victim for the purposes of Article 1 of the Optional Protocol in that he was a natural person who was personally affected by the fact that he was denied a pension by reason of his sexual orientation. He reiterated that both the Repatriation Commission and the VRB made it clear that the reason for rejection of his application was because his partner was not a member of the opposite sex, and therefore, because of his sexual orientation.

5) Decision

Consideration of Admissibility

The Committee, dismissing the State party's argument, recalled that an author of a communication is a victim within the meaning of Article 1 of the Optional Protocol if they are personally adversely affected by an act or omission of the State party. The Committee observed that the domestic authorities refused the author a pension on the basis that he did not meet the definition of being a "member of a couple" through not having lived with a "person of the opposite sex". In the Committee's view it was clear that at least those domestic bodies seized of the case found the author's sexual orientation to be determinative of lack of entitlement. In that respect, the author has established that he is a victim of an alleged violation of the Covenant for purposes of the Optional Protocol.

Consideration of the merits:

The Committee recalled its earlier jurisprudence that the prohibition against discrimination under Article 26 includes discrimination based on sexual orientation. It recalled that in previous communications the Committee found that differences in the receipt of benefits between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry with all the entailing consequences. It transpired from the contested sections of the VEA that individuals who are part of a married couple or of a heterosexual cohabiting couple (who can prove that they are in a "marriage-like" relationship) fulfil the

definition of "member of a couple" and therefore of a "dependant", for the purpose of receiving pension benefits. In the instant case, it was clear that the author, as a same sex partner, did not have the possibility of entering into marriage. Neither was he recognised as a cohabiting partner of Mr C, for the purpose of receiving pension benefits, because of his sex or sexual orientation.

The Committee recalled that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. However, the State party provided no arguments on how the distinction between same-sex partners, who were excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, was reasonable and objective. Subsequently, the Committee held that the State party violated Article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation.